Supreme Court, U.S.
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NO: 91-128

IN THF SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1991

GERALD ADLER and GISELA ADLER

Petitioner

v.

COMMISSIONER INTERNAL REVENUE SERVICE

Respondent

On Appeal from the United States Court of Appeals for the Ninth Circuit.

REPLY BRIEF OF PETITIONER

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QUESTION NO. I. Whether the Commissioner of Internal Revenue Service has met its burden of proof that the Statute of Limitations is not a bar to the Notice of Assessment of a Partner when the Commissioner failed to introduce any evidence that a consent to extend the time to assess the tax was given by the partnership.

QUESTION NO. II. Whether the principle set out in Kelly v. Commissioner, 877 F2d 756 (9th Cir.1989) and Fendell v. Commissioner, 906 F2d 36 (8th Cir.1990) applies to the partnership tax return, the principle is that in order for the Commissioner to adjust tax liability, he must do so at the source of income, in this matter the partnership.

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APPENDIX

A. OPINION OF UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT (UNREPORTED)

B. MEMORANDUM OF FINDINGS OF FACT AND OPINION OF THE UNITED STATES TAX COURT 57 (T.C. MEMO 1376(1989))

C. INTERNAL REVENUE CODE SECTION 6501(A)

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OPINION BELOW

The opinion of the United States Court of Appeal for the Ninth Circuit of which review is sought (Pet.App.A, page 1a) is unreported. That ruling affirmed the opinion of the U.S. Tax Court, based upon the reasons set forth in the Tax Court opinion.

(Pet.App.A, page 1a). The Memorandum and Findings of Fact and Opinion of the United States Tax Court is reported in 57 T.C. Memo 1376 (1989) (Pet.App.B, page 2a). The Honorable William M. Fay of the United States Tax Court ruled that the Statute of Limitations was not a bar to the tax assessment of tax imposed on the Petitioners for the tax years 1974, 1975 and 1977.

JURISDICTION

The unpublished opinion of the United States Court of Appeal was entered on April 4, 1991. The jurisdiction of this Court is invoked under 28 USC §2101(a).

STATUTORY PROVISION INVOLVED

The pertinent provision of the statute involved is Internal Revenue Code Section 6501(a) and (C)(4) which is set out verbatim in Pet.App.C, page 17a and 18a.

STATEMENT

The stipulations entered into by

Respondent and Petitioner did not foreclose the issues of whether or not the years involved are open or closed pursuant to IRC §6501. This is the single issue raised by the petitioner. Petitioner has not raised any new issues but has supplemented its argument based upon the decisions rendered in Kelly v. Commission 877 F2d 756 (9th Cir. 1989) and Fendell v. Commissioner 906 F2d 36 (8th Cir. 1990) which cases were decided after the briefs were submitted in the Tax Court. These supplemental arguments were properly raised in the appeal to the 9th Circuit. The Ninth Circuit rendered a decision and stated only "[f] or reasons set forth by the Tax court, we AFFIRM" (Petition App. 1(a).

Petitioners' position is based solely upon the facts presented to the Trial Court and Petitioners' request this court to grant this Petition for Certiorari, since Internal Revenue Code §6501 is a bar to the assessment.

No new evidence is necessary to support Petitioners position which is purely a matter of law.

ARGUMENT

In their opposition brief Respondent asserts that Petitioner seek to have this court decide an issue that was not raised in the Tax Court and/or was not addressed by the courts below. Respondents contention is without merit.

1. As stated previously the only issue raised by Petitioner is whether the Statue of Limitations is a bar to the statutory notices issued by the Commissioner of Internal Revenue Service. Respondent attempts to restrict this issue by restating the issue as one "whether Petitioner's attempted revocation of the extension agreement was effective and whether the deficiency notice subsequently issued by the Commissioner were therefore barred by the Statue of Limitations." (Opp Brief 5) This is

one of the arguments presented to the Tax Court by the Petitioner and Petitioner's reasserted this contention in their appeal. Petitioners however did not restrict their argument to this one sub-issue.

Pursuant to the stipulation entered into by Petitioners and Respondent there is no limitation and/or qualification to the defense of the Statute of Limitations is a bar. In fact, the Tax Court stated that "[t] he issue for decision is whether the Statue of Limitations barr assessment of income tax for the taxable years 1974, 1975 and 1977." (Pet. App. 8(a)) addressed this issue and found in favor of Respondent.

Petitioner on appeal raised the same issue but supplemented their argument based upon the finding of Kelly v. Commissioner, supra and Fendell v. Commissioner, supra.

The argument is that in order for the Commissioner to adjust tax liability, he must

do so at the source of income, here the partnership. And if no extension of time is obtained to assess the tax on a partnership in addition to the individual then any attempt by the Commissioner to assess the tax after three years is barred pursuant to Internal Revenue Code §6501.

This case is a proper case for review since the Petitioners were not the managing partners; the managing partner was not available, and the partnership's records were not available and/or were lost and destroyed. The issue of profit motive can only be determined at the partnership level for a partnership Aver v. Commissioner (1988) 55 TCM 678, and since the partnership records and managing partner were not available, Petitioners settled the issues of entitlement to the partnership matters since they would have been prevented from introducing evidence as to their individual profit motive to prove

entitlement to deductions and credits. Further the tax years had been pending for over 11 years. The Statute of Limitations exists in part so that after some time persons can be confident that their affairs are closed and they can dispose of old records. Petitioners assert that the Statute of Limitations is a barr to the assessment as made by respondent.

CONCLUSION

For the reasons set forth above Petitioners respectfully request this court to grant the Petition for Writ of Certiorari.

Respectfully Submitted,

September 16, 1991

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